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No. _____

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IN THE
SUPREME COURT OF THE UNITED STATES

GENE KIMMERLY SMITH (a trust);
Petitioner.

v.

OREGON DEPARTMENT OF REVENUE;
Janie 98037, Renee Sibley, Matthew Claflin,
Jolene FE3, John and/or Jane Doe, Revenue Agents, etc.
in their official and personal capacities;
Respondents.

ON PETITION OF A WRIT OF CERTIORARI TO
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Gene K. Smith, TTEE
GENE KIMMERLY SMITH (a trust)
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QUESTIONS PRESENTED

1. Did the appeals court err by dismissing the case without ruling on the separate and distinct issue regarding the state's refusal to except payment made in full in U.S. gold coin in contradiction to the Constitution of the United States of America Article I § 10?
2. Did the appeals court err by dismissing the case without ruling on the separate and distinct issue (related to question 1 above) regarding the state's demanding payment in something other than U.S. gold coin in contradiction to the Constitution of the United States of America Article I § 10?
3. Did the appeals court err by dismissing the case without ruling on the question of whether or not the state can lawfully demand payment after said payment was already made in full in accord with law?
4. Does the appeals court's dismissal of Petitioner's case without ruling on the Article 1 § 10 constitutional violations noted above also deny Petitioner of the 1st Amendment secured right "*to petition the Government for a redress of grievances*" and violate the 7th Amendment right to have the case heard in trial?
5. Does the appeals court's dismissal of Petitioner's case without ruling on the Article 1 § 10 constitutional violations noted above, effectively authorize the state to deprive Petitioner of property without due process of law thus further violating Petitioner's 5th and 14th amendment secured rights to not be deprived of property without due process of law.
6. Did the appeals court err by ruling Petitioner is not an instrumentality of the United States Government, the nature of which instrumentality has not been previously ruled on in United States Courts?
7. Did the appeals court err by dismissing the case for lack of jurisdiction based on the Tax Injunction Act (hereinafter "TIA") when:
   a. the case presented no challenge to any tax law;

b. the case does not interfere with the state's lawful collection of taxes;
c. the state's action clearly violates Article 1 § 10 of the Constitution of the United States of America, which forbids the state from making or demanding payment in anything but gold or silver coin.
d. the state is clearly violating the state's Enabling Act's restrictions from granting the state any authority to violate said Constitution;
e. the state is clearly violating the state's own statutes, which declare a payment tendered is a payment made (Oregon Revised Statutes (ORS) 73.0603);
f. the Petitioner is an agency and/or instrumentality of the United States Government;
g. the United States Government has a proprietary interest?

8. Did the appeals court err by ruling Petitioner has "adequate remedy in state courts", when in fact no such remedy exists for several of the causes of action?
9. Did the appeals court err by ruling Petitioner has "adequate remedy in state courts", when in fact no such remedy exists for a federal agency such as Petitioner, which cannot so sue in state court?
10. Does the appeals court's dismissal of Petitioner's case without ruling on the state's deprivation of Petitioner's character by publishing Distraint Warrants and Writs of Execution without following due process of law violate Petitioner's 5th and 14th amendment secured rights to not be so deprived of property without due process of law with or without U.S.C. 42 § 1983.
11. Did the appeals court err by dismissing the case without ruling on the issue that Defendants' motion does not meet the standard for review for the court to grant a summary dismissal?

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IN THE SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner, GENE KIMMERLY SMITH (a trust), respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit below.

OPINIONS BELOW

The opinion of the United States 9th Circuit Court of Appeals (Memorandum) appears at Appendix A and is not for publication. The order denying the petition for rehearing appears at Appendix B.

JURISDICTION

The date on which the United States Court of Appeals decided this case was August 4, 2005. A timely petition for rehearing was denied by United States Court of Appeals on October 18, 2005. The basis for federal jurisdiction in the court of first instance is: the constitutional questions as well as Title 28 §§ 1343(a)(3), 1331 and U.S.C. 42 § 1983.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED.

In pertinent part, the Constitution of the United States of America, Article I § 10, reads: "*No state shall...make any Thing but gold and silver coin a Tender in payment of debts*". The court erred by granting Respondents' Motion to dismiss without considering constitutional questions; which are:

1. Can the State of Oregon refuse to except payment made in full in U.S. gold coin in violation of the Constitution of the United States of America Article I § 10?
2. In relation to that question, can the State of Oregon demand payment in something other than U.S. gold or silver coin without violating said Article I § 10?

The appeals court's dismissal of Petitioner's case, without addressing said Article 1 § 10 questions, denies Petitioner of the 1st Amendment secured right "*to petition the Government for a redress of grievances*"; and,

The appeals court's dismissal of Petitioner's case, without addressing said Article 1 § 10 questions, denies Petitioner of the 7th Amendment secured right to have the case heard in trial?

The appeals court's dismissal of Petitioner's case, without addressing said Article 1 § 10 questions, in effect authorizes the state to ignore the United States Constitution, The United States Enabling Act for Oregon, their own Constitution and statutes and the due process of law accordingly required thus violating Petitioner's 5th and 14th amendment secured rights to not be deprived of property without due process of law?

The appeals court's dismissal of Petitioner's case without ruling on the state's deprivation of Petitioner's character by publishing Distraint Warrants and Writs of Execution without following due process of law violates Petitioner's 5th and 14th amendment secured rights to not be so deprived of property without due process of law.

The appeals court's dismissal of Petitioner's case without ruling on said Oregon's Constitution Article 1 § 10 (which reads in pertinent part, "*and every man shall have remedy by due course of law for injury done him in his person, property, or reputation*") violates Petitioner's secured rights to not be deprived of property without due process of law as per the last paragraph.

STATUTORY PROVISIONS INVOLVED.

The appeals court dismissed the case alleging a Tax Injunction Act (TIA), Title 28 U.S.C. § 1341, bar against federal court jurisdiction even though the TIA does not apply or bar jurisdiction when:

a. the case makes no challenge to any tax law;
b. the remedy requested in the case has no affect on the state's lawful collection of taxes;

c. the state is clearly violating the state's own statutes, which show that when a payment is tendered in full but refused said payment is considered lawfully made (Oregon Revised Statutes (ORS) 73.0603);
d. the state is clearly violating the state's Enabling Act's restrictions from granting the state any authority to violate the Constitution of the United States of America Article 1 § 10, which requires the state to make and demand payments only in gold or silver coin;
e. the Petitioner is an agency and/or instrumentality of the U.S. Government (Title 28 U.S.C. § 451);
f. the U.S. Government has in fact a proprietary interest in the case (see *U.S. v. Arlington County, Com. of Va.*, 326 F.2d 929).

In relation to paragraph e. above, Title 28 U.S.C. § 451 places jurisdiction beyond the ability of the state courts because Petitioner is an agency of the U.S. Government, which contradicts the trial court's dismissal and the appeals court's rule.

The state's deprivation of Petitioner's character by publishing Distraint Warrants and Writs of Execution without following due process of law violates Petitioner's 5th and 14th amendment secured rights to not be so deprived of property without due process of law and U.S.C. 42 § 1983 provides remedy in the federal courts for such deprivation, which remedy was denied Petitioner by the trial court and by the appeals court's rule.

STATEMENT OF THE CASE

Annually, in accord with law, Petitioner properly and timely filed all state and federal tax forms for tax year 1999 through 2002. Oregon Department of Revenue (hereinafter, "ODOR") sent Petitioner letters with incorrect names and addresses alleging Petitioner should file personal income tax forms, which allegation if followed would require Petitioner to violate the federal and state tax codes. Said letters were incomprehensible as delivered, wherefore, in accord with

ODOR's administrative review, Petitioner refused said ODOR letters and forms and returned the same to ODOR with an attached cover letter showing the causes for said refusal and requesting corrections if ODOR believed their cause was legitimate. ODOR failed to respond or otherwise correct their incomprehensible letters and/or forms in accord with law; rather ODOR began to speciously threaten collection actions.

To mitigate penalties and damages from occurring under ODOR's specious threat Petitioner went to ODOR headquarters in Salem, Oregon and paid the total amount of alleged debt owed for the tax years in question to ODOR's Cashier by tendering said payment in full to said Cashier in United States gold coins, at face value. ODOR refused to accept said gold coins alleging they could only receive funds in terms of Federal Reserve Notes. Thereafter, ODOR issued what they alleged to be "distraint warrants" and "writs of execution" against Petitioner's property.

The state's publication of said warrants and writs without following due process of law damaged Petitioner's reputation and rights. Accordingly, Petitioner (a Federal person and agency as described in the Complaint) filed a Complaint in District Court to compel ODOR to follow the law, account for said tender of payment and remedy the damages and deprivation of rights noted in the Complaint. Said Complaint was filed against ODOR and certain ODOR officials for unlawfully creating a warrant & alleged writ under color of state law and for filing an unlawful lien in Douglas County Clerk's Office against Petitioner's property after Petitioner had already paid all alleged taxes. Petitioner filed a Motion for Preliminary Injunction for relief from ODOR's spurious warrants and writs of execution. Respondents filed a Motion to Dismiss under F.R.C.P. 12(b) incorrectly alleging the court lacked subject matter jurisdiction as follows:

1) Plaintiff's claims are barred by the TIA;

2) Plaintiff fails to state a claim because the state is not a person under 42 U.S.C. 1983.

Respondents' motion failed to address the other issues like the issues related to ODOR refusing Petitioner's tender of payments, Petitioner's factual nature as an agency and instrumentality of the United States Government, which were plead in Petitioner's Complaint and pleadings; which issues also established federal court jurisdiction.

Petitioner filed a Motion to deny Respondents' Motion to dismiss based on the fact that Respondents' motion does not meet the standard for review for the court to grant a summary dismissal.

Based on the TIA the trial court granted Respondents' motion for summary judgment alleging there was recourse available in Oregon's Tax Court and so dismissed the case for lack of jurisdiction.

The trial court failed to take note or address either the issue of Petitioner's agency relationship with the U.S. Government or the issues related to the state's refusal of Petitioner's payment and their demand for payment contrary to constitutional limitations against the state.

Petitioner filed for a writ of error coram nobis in the nature of a FRCP Rule 60(b) motion to reconsider; however, the court did not respond to said motion to reconsider; therefore, Petitioner filed an appeal to the 9th Circuit Court of Appeals.

The appeals court upheld the trial court's ruling and provided a Memorandum alleging, "The district court properly held that the TIA bars this action because appellant not an instrumentality of the United States government". In actuality the trial court did not address Petitioner's nature as a United States Government agency or instrumentality, though petitioners nature as such was properly presented before the court — thus the appellate court's Memorandum (Appendix A) either incorrectly related the trial courts dismissal order or recognized that the trial court failed to address the issue of Petitioner's nature as an agent and/or instrumentality of the U.S. Government and then upheld the District Court's dismissal after reviewing that nature and the case 'de novo'. However, the appeals court review of that

nature was made totally off point — the cases the appeals court's used in said Memorandum to support their opinion have no relation either to Petitioner's nature or to the type of agency Petitioner is. Therefore, their review failed to examine the Material Facts of the case either as they are presented or in the light most favorable to Petitioner. Therefore, without Petitioner having a chance to prove said facts, the appeals court dismissed the case with no relevant of what it presented.

The appeals court Memorandum also incorrectly alleged, *"The district court properly held that ... appellant has adequate remedies available in the state courts"*; however, no such remedy exists.

Wherefore, Petitioner filed its Petition with the United States Supreme Court.

REASONS FOR GRANTING THE PETITION

In consideration of the fact that the trial court must hear a case in the light most favorable to plaintiff and the fact that Petitioner can prove its case if given the opportunity to do so, the question remains, "Did the district court and the appeals court err by dismissing the case without trial?" To understand the answer we must go to the basis for the courts' errant rulings, which basis is removed by understanding Petitioner's nature. Therefore, prior to showing 'Why the Appeals Court Erred' and 'Arguments for the Writ' we present the following uncontested material facts (collected from Petitioner's pleadings) as they relate to Petitioner's nature as an agency or instrumentality of the United States Government:

Uncontested Material Facts:

Petitioner's creation and nature as an agency or instrumentality of the United States Government:

1. The Social Security Administration (SSA) was created in accord with the Social Security Act of 1935 (SSAct), which states:

"AN ACT to provide for the general welfare...; to establish